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Illegal Procedure - The Rozelle Rule Violates the Sherman Antitrust Act

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RECENT DECISIONS

Illegal Procedure—The Rozelle Rule Violates The Sherman Antitrust Act—The trial of *John Mackey v. National Football League*[1] began on February 3, 1975 and ran fifty-five days. Sixty-eight persons testified. The court, sitting without a jury, considered 400 exhibits and the transcript covered 11,000 pages. Six months after the trial ended, Judge Earl R. Larson filed his Findings of Fact, Conclusions of Law and Order of Judgment. His conclusion was another blow to the player allocation system in the NFL: the Rozelle Rule violated the antitrust laws.

The plaintiffs were fifteen present and former players in the NFL. Six[2] were seeking injunctive relief against the use of the Rozelle Rule. The other nine[3] were seeking monetary damages. The defendants were the NFL, an unincorporated association of professional football teams, Mr. Alvin Rozelle, individually and as Commissioner of the NFL, and each of the twenty-six member teams of the NFL.

The issues, as stated by the court, were clear. The plaintiffs alleged that the Rozelle Rule constituted a per se violation of Section 1 of the Sherman Antitrust Act.[4] In the alternative, the plaintiffs alleged that if the Rule was not such a per se violation, then it was illegal as an unreasonable restraint of trade. In either event, the plaintiffs sought injunctive relief and damages. The defendants alleged that there was no per se violation, no unreasonable restraint of trade, and therefore no antitrust violation. Defendants further claimed that they were immune from the operation of the antitrust laws under the labor exemption, and that the district court lacked jurisdiction as exclusive jurisdiction was in the National Labor Relations Board.[5] With the issues so framed, and pursuant to an order that postponed any consideration of damages until liability under the antitrust laws had been decided, the case went to trial.

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1. No. 4-72—Civil 277 (D. Minn. 1975) [hereinafter Mackey].

2. Kermit Alexander, Kenneth Bowman, William Curry, Thomas Keating, John Mackey and Alan Page.

3. Olie Austin, Marlin Briscoe, Richard Gordon, John Henderson, Clint Jones, Gene Washington, Charles West, John Williams and Nate Wright.

4. 15 U.S.C. §1 (1970).

5. Mackey at 2.

The court's Findings of Fact, Conclusions of Law, and Order of Judgment were presented in outline form.[6] In the first paragraph the court resolved a threshold issue by concluding that "[t]he business of professional football is subject to the antitrust laws,"[7] citing *Radovich v. National Football League.*[8] In *Radovich* the Supreme Court ruled that the two cases[9] that gave the antitrust exemption to baseball were applicable to baseball only and not to all team sports as the trial court and Court of Appeals had found. Once the exemption was so limited, the finding that professional football was covered by the antitrust laws followed easily.

Having disposed of that preliminary issue, and as part of the Findings of Fact, the court embarked on a discussion of what the Rozelle Rule actually is and what restrictive and anticompetitive effects it has. The Rule states that:

> [a]ny player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.[10]

The Rule was unilaterally adopted by the teams of the NFL as an amendment to its Constitution and By-Laws in 1963.[11] It is binding on each team in the NFL by virtue of its inclusion in the Constitution and By-Laws. From the adoption of the Rule

6. Due to the outline form of the court's Findings of Fact, Conclusions of Law and Order for Judgment, the specific reasoning that the court used in arriving at its conclusions is not stated. Throughout the text, statements by the court are indicated. Substantial parts of the background and analysis are the author's own based on research and reasoning.

7. Mackey. ¶ 1.1 at 3.

8. 352 U.S. 445 (1957).

9. Federal Baseball Club v. National League, 259 U.S. 200 (1922), Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).

10. NFL Constitution and By-Laws, 1975 § 12.1(H).

11. Mackey, ¶ 2.3 at 4.

in 1963 until the end of this trial, the Commissioner had used the Rule four times to award compensation.[12]

The conflict surrounding this Rule becomes clear when its operation is compared to the policies and purposes of the antitrust laws. The basic purpose of the Sherman Antitrust Act is to promote free and open competition.[13] The basic purpose of the Rule is to restrict competition among the NFL teams for the services of professional football players. The Rule makes it impossible for a player whose contract has expired to sell his services in a free and open marketplace. Teams are understandably reluctant to sign a free agent when they do not know what will be demanded of them in compensation to the player's former team. A player who desires to switch teams must convince the team that he wishes to play for that he is worth both the salary he is demanding and whatever the Commissioner, if the teams themselves cannot agree, decides is adequate compensation to his former team. The net result is that the player's ability to get competitive bids for his services is severely restrained.

The court cited the Dick Gordon incident as a classic example of the dampening effect the Rule has on negotiations between teams and free agents.[14] Gordon completed his contract duties to the Chicago Bears and became a free agent in 1972. Several teams wanted to sign him, but none could agree with the Bears on mutually satisfactory compensation. As a result, no team had signed Gordon well into the 1972 season. Commissioner Rozelle then publicly announced, in advance of any signing, what compensation he would require any team signing Gordon to give the Bears: one first round draft choice for the draft following the 1973 season. The Commissioner's

12. In 1967, Pat Fisher went from the St. Louis Cardinals to the Washington Redskins. St. Louis was compensated with a second round draft choice in the 1969 draft and a third round choice in the 1970 draft. In 1967, David Parks went from the San Francisco 49ers to the New Orleans Saints. San Francisco was compensated by being awarded Kevin Hardy, New Orleans first round draft choice in the completed 1968 draft, and New Orleans' first round choice in the upcoming 1969 draft. In 1972, Phil Olson went from the New England Patriots to the Los Angeles Rams. New England was compensated by the Rams' first and third round draft choices in the 1972 draft and $35,000 in cash. In 1972, Dick Gordon went from the Chicago Bears to the Los Angeles Rams. Chicago was compensated by the Rams' first round draft choice in the draft following the 1973 season.

13. United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

14. Mackey, [1] 2.7.4 at 5.

announcement removed from Gordon's contract negotiations the albatross of the unknown compensation award, and Gordon was signed by the Los Angeles Rams "immediately thereafter."[15]

The court then directed its attention to the question of whether this Rule is an antitrust violation. Alleged anticompetitive conduct can be determined to be an antitrust violation under either of two tests. The conduct is either a per se violation or it violates the rule of reason. Per se violations are those

> agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[16]

A group boycott, which was alleged in this case, is a per se violation.[17] In contrast to a rule of reason analysis, proof of a per se violation is directed toward establishing existence of the prohibited conduct and not toward an examination of the effects that the conduct has on the market. If the conduct complained of is not a per se violation, then the issue becomes whether the conduct is an unreasonable restraint of trade.

While it was specifically the Rozelle Rule that was under attack, the court stated that

> [a] better understanding of the Rozelle Rule requires analysis of other anticompetitive rules and practices of the defendants. These rules . . . impose severe hardships on a player prior to his ever becoming a free agent and deter players from playing out the option and achieving that status.[18]

The court considered four other rules: the draft, the standard player contract, the option clause, and the tampering rule.

The first restrictive practice, the player draft, is a process through which virtually all players qualified to play in the NFL are assigned to the various teams. The drafting team has "the exclusive right to negotiate for the services of each player selected by it."[19] No other team may negotiate with a drafted

15. *Id.*

16. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

17. Fashion Originators Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941).

18. Mackey, ¶ 3.1 at 5.

19. NFL Constitution and By-Laws, 1975, § 14.5.

player without the consent of the drafting team. Through the draft, NFL teams, in concert, deny the player the "opportunity to negotiate with clubs other than the one club that drafted him."[20] No competitive bidding for players is allowed. Should a player be unwilling to play for the team with his draft rights, or should he be unwilling to accept the contract terms offered, he is "effectively boycotted or blacklisted"[21] by the others.

The second restriction is that no team is allowed to employ a player who has not signed a standard player contract. While some modifications are allowed in the terms of this contract, none are allowed that would open a player's services to free competition, and the Commissioner has the right to veto all changes in the contract proposed by the individual team and player.[22] Under the terms of the contract, the player agrees to comply with and be bound by the NFL Constitution and By-Laws (including the Rozelle Rule)[23] and to allow the club to unilaterally extend the standard contract for one year under the option clause.[24]

The option clause was the third restrictive rule and practice considered. This clause[25] permits NFL teams to exert pressure on a player to stay with his present team in two ways. First, once a player decides that he wants to leave his present team, the team, knowing his wishes, can force him to remain one year beyond the contract term. During this year, the player risks injury, poor performance, and possible informal discipline by disapproving coaches and owners, any of which could substantially reduce his value to another team. Secondly, while run-

20. Mackey, ¶ 3.2.2 at 5.

21. *Id.*, ¶ 3.2.2 at 6.

22. NFL Constitution and By-Laws, 1975, § 15.1.

23. Standard Player Contract for the National Football League, ¶¶ 2, 4.

24. *Id.* at ¶ 10.

25. The option clause reads in full:

The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in ¶ 1 hereof, renew this contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further term, which rate of compensation shall not be less than ninety percent (90%) of he sum set forth in ¶ 3 hereof and shall be payable in installments during the football season in such further term as provided in 3; and (2) after such renewal this contract shall not include a further option to the Club to renew the contract. The phrase "rate of compensation" as above used shall not include bonus payments or payments of any nature whatsoever and shall be limited to the precise sum set forth in ¶ 3 hereof.

ning the gauntlet of the option year, hoping that he emerges at the other end with his football value sufficiently intact to bargain effectively with other teams, the player takes a ten percent cut in pay. These two pressures, imposed by the team on its players, tend to force players to remain on their respective teams and restrict free competition for players.

The fourth restriction considered by the court was the tampering rule.[26] This rule forbids any team to negotiate with any player under contract to any other team. Violators can be fined or denied draft choices. To understand the extent of the restriction this rule imposes, it is important to realize that the term of the standard player contract is from the date of execution until May 1 following the last season covered.[27] Therefore, even though the season for most teams ends in December, and all teams have completed play by mid-January, no contract negotiations are permitted for about four months. By May 1, only three months remain until the beginning of summer camps for a player to complete all his contract negotiations with a new team. The effect of this short negotiation period is to tend to force players to remain with their present teams.

So the web is complete. When a player leaves college, no team will negotiate with him other than the team that drafts him. No other team will negotiate with him while he is under contract to any other team. When his contract term is up, his team can unilaterally extend it for one more year at a ten percent cut in pay. If he does play the option year, no team will negotiate with him until the following May 1. When teams can negotiate with him, they are reluctant to sign him and risk the unknown compensation award. Thus his ultimate choice usually is either "re-signing with his former club or not playing football."[28]

The court found that the operation of this system restricted the number of clubs that were willing to sign free agent players. The Rule created the anomalous situation that "[t]he player's former club, even though it no longer has any contractual rights to the player, in fact does have rights to the player by reason of the Rozelle Rule, and can and does demand and receive

26. NFL Constitution and By-Laws, 1975, § 9.2.
27. Standard Players Contract for the National Football League, ¶ 1.
28. Mackey, ¶ 4.5 at 7.

equal compensation for him."[29] The Rule "substantially restricts players' freedom of movement, . . . substantially decreases players' bargaining power in contract negotiations" and denies the player the right to "sell his services in a free and open market."[30] (Paragraph numbering omitted). "As a result, salaries paid by each club are lower than if competitive bidding were allowed," there is reduced "interstate commerce of players" and the "NFL and each club unlawfully benefit from the existence"[31] of the Rule. (Paragraph numbering omitted).

Based on the above data, the court concluded that the Rozelle Rule is a per se violation of the antitrust laws as a concerted refusal to deal and a group boycott.[32] The court's conclusion is based on *Fashion Originators' Guild of America v. Federal Trade Commission*,[33] [hereinafter cited as *FOGA*], *Klor's, Inc. v. Broadway-Hale Stores*,[34] and *United States v. General Motors*.[35] Once the Rule was found to be a per se violation, evidence the NFL had presented to show the reasonableness of the Rule in the factual context in which it operated became unimportant. Under all circumstances, the Rozelle Rule is illegal.

In this writer's opinion, the court's conclusion that a group boycott existed is erroneous. The cited cases were examples of group boycotts arising in two distinct factual situations. In *FOGA* and *General Motors*, the terms of the agreements among the conspirators were that the group would allow no dealing whatsoever with the group that had earned their disfavor. In *Klor's*, instead of totally refusing to deal, the group agreed to deal but only on terms so discriminatory that the end result was the same as a total refusal. As will be shown below, neither of these factual patterns existed in this case and the finding of a group boycott was therefore improper.

In *FOGA*, the Guild was an organization representing designers, manufacturers, sellers and distributors of women's dresses. The Guild's dresses were original and distinctive and it was from this characteristic that they derived a great deal of

29. *Id.*, ¶ 4.7 at 8.
30. *Id.*, ¶¶ 4.11, 4.12 and 4.12.2 at 8.
31. *Id.*, ¶¶ 4.12.3, 4.13, 4.15 at 9.
32. *Id.*, ¶ 5.1 at 9.
33. 312 U.S. 457 (1941).
34. 359 U.S. 207 (1959).
35. 384 U.S. 127 (1966).

their value. Because these designs were not protected by patents or copyrights, upon entering the stream of commerce they were copied by other manufacturers and sold at lower prices thus undercutting demand for the Guild dresses. To combat this style piracy, the members of the Guild agreed that they would not sell their dresses to any retailer who also sold copies. Due to the size and power of the Guild and the demand for their dresses, 12,000 retailers nationally agreed with the Guild to boycott the copiers. In a suit brought by the FTC, the Supreme Court found the Guild arrangement a group boycott and a per se antitrust violation.

General Motors was factually analogous. In that case some Chevrolet dealers were selling cars to discount houses which in turn sold them to the public at prices that other Chevrolet dealers could not match. These other dealers, injured by the discount house competition, induced General Motors to force any dealers supplying autos to the discounters to discontinue doing so. As in *FOGA,* the result was a complete boycott of the discounters by General Motors in an sttempt to *"eliminate* a class of competitors by *terminating* business dealings"[36] with them. (emphasis added).

The Rozelle Rule, however, is factually distinguishable from the Guild and General Motors boycotts. Besides being a boycott by a seller, the Guild and General Motors both agreed to deny all sales to the boycott target. There were no conditions on the ban. The Rozelle Rule, on the other hand, operates differently. NFL teams have not agreed to totally refuse to deal with free agent players. As the court recognized, these teams did negotiate with and sign free agents.[37] These teams, instead of boycotting free agent players by denying interteam movement completely, as they have the power to do, chose only to restrict such movement by requiring compensation to be paid to the player's former team. Because the movement was restricted and not denied, labeling the group's conduct a boycott was unjustified. The court's conclusion was to find that teams, while they are negotiating with and signing free agent players were at the same time boycotting them. Because the Rozelle Rule restraint is incomplete and conditional, *FOGA* and

36. *Id.* at 140.
37. *E.g.*, Mackey, ¶¶ 2.7.1, 2.7.2, 2.7.3, 2.7.4 at 4-5.

General Motors should not have been relied upon in this case. The court's reliance on those cases led it to the improper conclusion that a boycott exists here.

Klor's is an example of a second type of group boycott cases. Klor's, Inc. was a retailer of home appliances. Broadway-Hale, located next door, was one of a chain of stores selling the same appliances. Klor's alleged that Broadway-Hale and ten manufacturers of the appliances that Klor's needed in its trade conspired "either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms."[38] As a result, Klor's was completely foreclosed from selling the appliances of the ten manufacturers involved and its business suffered. The Supreme Court, hearing the case on an appeal from a summary judgment granted the defendants, ruled that the facts disclosed a boycott and the case was remanded for trial.

The *Klor's* case presents an example of a boycott which was total in effect while nominally allowing goods to flow to the target. Klor's was not precluded from dealing with the ten manufacturers by the terms of the agreement among the conspirators. However, the conditions under which it was forced to deal were such that no reasonable businessman could accept them and remain in business. As a result, Klor's was driven "out of business as a dealer in the defendant's products."[39]

Similar distinctions exist between *Klor's* and the Rozelle Rule as existed between *FOGA* and *General Motors* and the Rule. While Broadway-Hale took a more subtle approach than did the Guild, the intent and the effect in both cases was to completely stop dealings between the group and the target. One chose to do so directly, the other indirectly, but the single unifying thread between these cases is the total end of business intercourse between group members and the boycott target.

The Rozelle Rule is cut from a different mold. It is in the nature of a "conditional" boycott. NFL teams will not sign free agent players formerly under contract to other teams unless compensation is paid. This restriction, conditional in nature, is fundamentally different from the total boycotts in the cases cited by the court. It is not a *Klor*'s-type boycott where the conditions that all NFL teams place on negotiations with free

38. 359 U.S. 207, 209 (1958).
39. *Id.* at 213.

agent players are so restrictive that no player can play the option year, become a free agent and sign with another team. While it could be argued with some force that it is a boycott for average and below average players who are unable to induce new teams to risk unknown compensation, the court chose not to use that approach. By ruling that the Rule *in toto* was a boycott, after recognizing that some players do in fact move from one team to another, the court weakened its boycott analysis. Nor should the implications of labeling conduct a per se violation be taken lightly. It declares conduct illegal that in some situations may be desirable or at least be without serious adverse effects. Indeed, both cases[40] and commentators[41] have recently argued that the group boycott should not in all instances be considered a per se violation. In such a context, the court should not have extended the language of the complete boycotts in *FOGA, General Motors* and *Klor's* to the "conditional" boycott represented by the Rozelle Rule. Under the above analysis it is clear that although the Rule is a restriction on the ability of a player to sell his services in a freely competitive market, it is not a per se violation as a group boycott.

There is also case law supporting the proposition that due to the unique nature of professional league sports, the per se rules should never be applied to them.[42] These cases concluded that the continued existence of professional sports leagues logically requires that some competitive balance among the individual teams be maintained. *Kapp v. National Football League*[43] dealt with an attack on many of the same NFL rules considered in this case. The court concluded that the legality of the rules should be determined by the use of the rule of reason for two reasons. First, they considered the singular position of league sports and their need for competitive balance, as noted above. Second, they noted that player-league relations are particularly susceptible to collective bargaining and that

> [a]pplication of the absolute *per se* rule to *all* league rules enforcing restrictions upon the players' free choice of employ-

40. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, *rehearing denied* 397 U.S. 1003 (1970).

41. 48 TEMP. L. Q. 126 (1975).

42. *E.g.*, Flood v. Kuhn, 309 F. Supp. 793 (S.D. N.Y. 1970); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972).

43. 390 F. Supp. 73 (N.D. Cal. 1974).

> ment tends to preclude collective bargaining negotiations for league enforcement of some rules in this category which, considering the unique nature and purpose of league sports, may be regarded by both players and clubs as reasonably necessary in furtherance of their long-range *mutual* interests.[44]

These cases were not relied upon in the *Mickey* decision probably because the court was not impressed with either the effect of the Rozelle Rule on the competitive balance or the effectiveness of league-player collective bargaining. Other courts have, however, found these factors to be sufficient reasons to forego the per se analysis and confine themselves to the rule of reason in determining legality of these player restrictions.

Having "specifically found that the Rozelle Rule constituted a *per se* violation of the antitrust laws,"[45] the court also concluded that it is "invalid under the Rule of Reason standard."[46] The court may have entered this discussion to provide the basis for an appellate court to conclude that the Rozelle Rule is illegal, should it not accept the per se argument. Actually, no discussion of this evidence was needed. A conclusion that an activity is a per se violation means that it is so pernicious that no adequate justification can be given for its use. It is per se unreasonable and an additional independent finding of unreasonableness is not needed.[47]

Rule of reason analysis, by way of introduction, is significantly different from per se considerations. Per se analysis is complete once conduct of specified types is determined to exist. No consideration of the effects of this conduct on the relevant market is needed. Under the rule of reason, however, these effects are critical and the legality or illegality of alleged anticompetitive activity is determined by considering its effects on the relevant market and the business reasons presented for its use. Some restrictive agreements, although they eliminate competition between the parties, may strengthen competition in the market place. Short term restrictions in competition may have beneficial long term consequences.[48] In sum, if it can

44. *Id.* at 81-82.
45. Mackey, ¶ 6.1 at 9.
46. *Id.*, ¶ 6.2 at 9.
47. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).
48. 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 45 (1973).

be shown that the conduct, allegedly anticompetitive, is based on understandable business requirements, that there is no specific intent to accomplish forbidden restraints and that there has been no diminution in the strength of market competition, then the conduct is not an unreasonable restraint of trade, does not violate the rule of reason and is not illegal.[49]

In applying these considerations to a particular case, there is no single test to determine when an unreasonable restraint of trade is adequately demonstrated. There is, however, consensus on some of the factors to be considered. In *Chicago Board of Trade v. United States,* the Supreme Court held that the

> true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, all are relevant facts.[50]

The gist of the rule of reason analysis is the effect that the restraint has on the area of the economy within which it operates and whether its use can be justified in that context.

The *Mackey* court's rule of reason analysis was divided into two parts. The court first stated its reasons for finding the Rozelle Rule unreasonable. It then considered the arguments presented by the NFL designed to show that the Rozelle Rule, in the context of professional football, is not unreasonable.

The court first found the Rule unreasonable due to its overly broad application.[51] The evidence indicated that the NFL created the restriction because it feared the effects of movement from team to team of the best players in the league. Little or no concern was expressed regarding the movement of players of average or below average ability. The Rule, however, applies to all players equally. It covers players whose move-

49. Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953).
50. 246 U.S. 231 (1918).
51. Mackey, ¶ 6.2.1 at 9.

ment would in no way endanger the goals that the Rule was designed to protect. As such, the court concluded, it is overbroad and unreasonable.

The second reason for finding the restraint unreasonable was "that there are no procedural safeguards whatsoever with respect to its employment."[52] The Rule may be a crucial factor in determining a player's employer. A free agent's former team may severely curtail interest in the player by making unreasonable compensation demands, thereby forcing the team seeking the player to either risk the unknown slings and arrows of a Rule compensation or leave the player alone. At no point in this process is any input received from the player. He has "no hearing or opportunity to be heard."[53] In fact, the "free agent player may not even be aware that other clubs are interested in him and are negotiating with the club to which he was formerly under contract."[54] In the court's opinion, this denial of an opportunity to be heard, secret bargaining for players without their knowledge, and absence of safeguards to prevent teams from using the Rule to nearly stop player movement altogether, all make it an unreasonable restraint on trade and an antitrust violation.

Third, the court found the restraint "unreasonable in that it is unlimited in duration."[55] The Rule follows a player wherever he goes. He cannot avoid it by playing the option year and totally completing his contract obligation to a team, nor may he avoid it by staying out of the NFL altogether for a period of time.[56] In considering the identical issue, the court in *Kapp v. National Football League* stated that the effects of the rule could be to "perpetually restrain a player from pursuing his occupation among the clubs of a league that holds a virtual

52. *Id.*, ¶ 6.2.2 at 9-10.

53. *Id.*

54. *Id.*

55. *Id.*, ¶ 6.2.3 at 10.

56. Joe Kapp, a plaintiff in another case attacking the player restrictions in the NFL is an example. Kapp was drafted by Washington at the end of his college career and could not come to terms with them. He then played seven years in Canada. On his return to the NFL in 1967 with the Minnesota Vikings, the Vikings had to compensate Washington. When Kapp left the Vikings and signed with the New England Patriots in 1970, the Vikings were compensated. After Kapp refused to sign a standard player's contract with the Patriots and left football, the Patriots kept him on their lists in order to demand compensation should Kapp ever enter the NFL again.

monopoly of professional football employment in the United States."[57] They further concluded

> that such a rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and that it imposes on the player employees such undue hardship as to be an unreasonable restraint and such rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test.[58]

The *Mackey* court would fully agree.

Lastly, if the Rule standing alone is unreasonable, it is *a fortiori* unreasonable when viewed in conjunction with the other anticompetitive practices of the NFL mentioned above.

The second aspect of the court's rule of reason discussion was a review of the arguments of the defendants designed to show that the Rule, as used in the context of professional football, is reasonable. Defendants initially claim that "one of the purposes of the Rozelle Rule is to protect the member clubs investment in established players"[59] and is therefore reasonable. This investment is comprised of costs associated with, for example, scouting of players and general player development. In return for this investment, a team hopes to get a player that can contribute to its championship aspirations.

Through the Rozelle Rule this investment is protected in two ways. First, a team knows that since no player can sign with another team without compensation being paid, the team will recover part or all of its investment in a player through this compensation. Second, the investment is further protected because the probability that any player will leave a team at all is decreased. In rejecting this argument, the court stated that these expenses are not unlike those of other businesses which have hiring and training costs. The NFL has "no right to compensation for this type of investment,"[60] and, apparently, no right to protect that investment through the use of burdensome restrictions on player movement.

The second argument advanced by the NFL in support of the reasonableness of the Rozelle Rule revolved around player

57. 390 F. Supp. 73, 82 (N.D. Cal. 1974).
58. *Id.*
59. Mackey, ¶ 6.3.1 at 10.
60. *Id.*

continuity.[61] The NFL argued that in order for a football team to be successful, its members must learn to work together. This continuity requires time to develop and would be frustrated if the team could not rely on having the same players each year. If free movement of players were allowed, the quality of the play in the NFL would suffer, the ticket buying public would no longer respond, and players and teams alike would suffer. The Rozelle Rule, the argument claimed, works to prevent this deterioration and ought, therefore, to be recognized as reasonable in the context of professional football.

Based on the evidence presented at trial, the court concluded that "[t]he quality of play in the NFL will not decrease with the elimination of the Rozelle Rule and consequent freedom of employment."[62] More significantly, the court also concluded that even if "the quality of the play would decrease, that fact does not justify the Rule's anticompetitive nature."[63] This second conclusion is particularly significant. It demonstrates that if a balance needs to be struck between a player's right to competitively sell his services and the league's interest in maintaining high quality football, the player will win. If a choice has to be made, the freedom of a player to sell his services to the highest bidder will not be sacrificed to the maintenance of quality football. In a practical sense, this conclusion could have devastating effects.

The court recognized the possibility that it was factually wrong and that the Rule actually does promote teamwork and higher quality play by keeping players together. In that case, the elimination of the Rule could have an effect on the quality of the NFL's product. As quality deteriorates, revenue from disenchanted fans could be expected to decline to the injury of teams and players alike. Eventually, the existence of the league itself could be threatened as salaries, pumped by competitive bidding, increase and revenues decrease. The court concluded that even if this scenario should come to pass, the right of a football player to freely sell his services would take precedence over continued existence of football as we know it. In some respects it seems that the court has fixed the players' wagon to a falling star. Legally, however, the court is bound to apply

61. *Id.*, ¶ 6.3.2 at 10.
62. *Id.*, ¶ 6.3.2.2 at 10.
63. *Id.*

the law to the facts as it finds them. The court found that the Rozelle Rule does not protect the quality of play and in that factual context, its conclusion is justified.

The NFL's third defense of the Rule was related to the second. The Rozelle Rule operates, it alleged, to maintain a competitive balance.[64] The Rule keeps the very good players from congregating on one team to the detriment of the rest of the league and, ultimately, of the players themselves.

The court disagreed. It concluded that not only was maintaining a competitive balance not sufficient justification for the restrictions, but "that the existence of the Rozelle Rule and other restrictive devices on players have not had any material effect on competitive balance in the National Football League."[65] This conclusion directly contradicts the conventional wisdom on the subject of competitive balance, but it may have substantial support in economic theory.

The economic theory of player restrictions was thoroughly discussed in a recent article[66] concerning player restrictions in professional baseball. The theory is directly applicable to the NFL rules and recognizes that professional major league sports are businesses and as such should respond to the forces that control their economic survival. Teams have an economic interest in keeping games relatively close and thereby generating fan interest. Lopsided games, without the element of uncertainty, would attract fewer fans and decrease revenue. Thus, buying up all the best talent in the league, and thereby insuring lopsided games, is not in any team's best economic interest. At some point, therefore, a strong team will pass up a good player and be willing to see him play for another team.

The economic theory also suggests that resources tend to move toward their most highly valued uses. If a player is most valuable to the team with his present contract, then no other team will be able to bid him away. But, if the player is more valuable to some other team, and if the transfer costs are small, then the other team will bid the contract away from the player's present team. These market forces would tend to keep all the best players from congregating on one team, as at some point, a third star player is of less value to Team A than a first

64. *Id.*, ¶ 6.3.3 at 11.

65. *Id.*

66. Westerfield, *Restrictive Labor Practices in Baseball: Time for a Change?*, FEDERAL RESERVE BANK OF PHILADELPHIA BUSINESS REVIEW, 1975.

is to Team B. In such a situation, Team B gets the player. Furthermore, systematized restrictions on player movement, such as the Rozelle Rule and the player draft, are not equal to the task of stopping movement in response to these pecuniary considerations. Players constantly move from team to team through trades. The article's conclusion was, therefore, that sales and trades probably offset any leveling effects created by the reserve system and the player drafts, and that "the distribution of playing talent between rich and poor teams is not affected by the reserve clause."[67] It may have been just such an analysis, applied to football, that led the *Mackey* court to the same general conclusion regarding the Rozelle Rule.

The *Mackey* court also concluded, however, that even if its analysis was incorrect and the Rozelle Rule did foster competitive balance, the illegality of the Rule would not change. If some sort of restrictions were needed, the NFL would have to substitute legal ones for the present illegal ones. The court specifically mentioned Competition Committees, multiyear contracts, and special incentives. With the artificial restriction of the Rozelle Rule gone, NFL teams are presented with an option. They can do nothing to restrict player movement and must hope that the judge is right in finding that neither the quality of play or competitive balance will be affected. In the alternative, they can replace the Rule restraints with other incentives calculated to keep players on their present teams through free choice.

The fourth defense presented by the NFL to support the reasonableness of the Rozelle Rule is that elimination of the Rule would cause disruption and irreparable damage to the league.[68] This defense was apparently based on a fear that without this weapon available to the NFL to deter players who seek to play for other teams, the pent-up demand among players to play elsewhere would cause a sudden and severe disruption in the league as these players moved. Further disruptions would occur each time a player became unhappy with his present team and moved. The damage to the league would result either through loss of continuity or by one or two teams accumulating the best players.

The court concluded that these fears were without founda-

67. *Id.* at 21.
68. Mackey, ¶ 6.3.4 at 11.

tion and that the "[e]limination of the Rozelle Rule would have no significant immediate disruptive effects on professional football."[69] This conclusion was based on the fact that all players in the NFL are presently under contract to some team and at any given time, only a few are playing in the option year. Even if the Rozelle Rule were abolished tomorrow, present contract duties of most players would preclude their moving to other teams. Thus there could be no "immediate" disruption. But the judge was not unaware that he may be causing some fundamental changes in the present structure of the game. He recognized that "changes in location of franchises or reorganization of existing franchises may occur."[70] The basic conclusion of the court seems to be that professional football has known since 1957[71] that it is subject to the antitrust laws but it has chosen to structure itself in violation of those laws. Since its development has been distorted by the existence of antitrust violations, some modifications can be expected when those practices are ended. Those changes are the price the NFL will pay for its past antitrust transgressions. The court finally suggested that "[i]f the effects of this decision prove to be too damaging to professional football . . . Congress could possibly grant special treatment to the National Football League based upon its claimed unique status."[72]

In sum, the court considered the NFL's arguments concerning the reasonableness of the Rozelle Rule and concluded it was an unreasonable restraint of interstate commerce of football players, and illegal.[73] As noted above, the basis of the rule of reason is the analysis of the good business reasons for engaging in specified conduct and an evaluation of its effects on competition. The NFL presented four business reasons that it considered sufficient to justify the admitted restraint on player movement. The court considered each one individually and concluded that the justifications presented either did not exist

69. *Id.*

70. *Id.*, ¶ 6.3.4.4 at 11.

71. The date of the Supreme Court's decision in Radovich v. National Football League, 352 U.S. 445 (1957).

72. Mackey, ¶ 6.3.4.5 at 11. Congress has come to the aid of professional football on at least two other occasions. In 1961, Congress allowed professional football teams to pool their individual television rights for sale on a league basis to the networks. 15 U.S.C. § 1291 (1970). In 1966 that law was amended to allow merger of the National Football League and the American Football League.

73. Mackey, ¶ 6.2 at 9.

factually or were not a sufficient basis to mitigate what would otherwise be a violation. To further support the conclusion, the judge also found four separate reasons for concluding that the rule is unreasonable in its application. Nor is the court's conclusion weakened because the court recognized that its conclusions on player continuity and competitive balance may be incorrect. While the rule of reason does allow some restraint, whether a restraint is to be tolerated will depend to a substantial degree on whether the restraint, in its operation, recognizes "competition as the basic instrument of social control."[74] Promotion of an interest "other than workable and effective competition will not justify the restraint."[75] The basic underpinning of the Rozelle Rule is clearly not a commitment to free competition for services of players and thus even if the defenses of the NFL were accepted, the antitrust result would probably be the same.

Having exhausted its defenses of the Rule itself, the NFL turned to two other defenses. The NFL argued that this case should not have been heard by the court because the NFL was protected from antitrust scrutiny by the labor exemption to the antitrust laws.[76] They also argued that primary and exclusive jurisdiction of this dispute was properly in the National Labor Relations Board.[77]

The labor exemption was enacted to protect labor unions from antitrust attack when legitimate labor union activities resulted in ancilliary restraints of trade. The Supreme Court found that the purpose behind the exemption was to clarify the vulnerability of union activities to antitrust attack.[78] The Court concluded that the act had a two fold purpose: to make clear that certain acts by businessmen were illegal, and that the same or similar acts by unions were not illegal. Congress' interest in passage was to reverse prior decisions[79] that had held unions subject to antitrust attack. The exemption was to "accommodate the coverage of the Sherman act to the policy

74. 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 45 (1973).

75. *Id.*

76. Mackey, ¶ 7 at 11.

77. *Id.*, ¶ 8 at 15.

78. Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945).

79. *E.g.*, Loewe v. Lawlor, 208 U.S. 274 (1908); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).

of the labor laws."[80] It was not designed to protect employers from similar attacks.

All union activity, however, has never been exempt from such antitrust attack. If the Rozelle Rule is to be found to be union activity, and therefore exempt, it must be shown that the union was engaged in "arms-length bargaining in pursuit of their own labor union policies."[81] The union must be acting in its own self interest. Without any consideration of these cases, the *Mackey* court concluded that as applied to the facts of this case, the exemption was not available.[82]

The court initially noted that "[t]he Rozelle Rule is not, and has not been considered by the union to be in the players' best interests."[83] The interests of the players are clearly to rid themselves of the restriction that denies them the freedom to sell their services in a free and open market. The restraint could, however, be in the players' best interest if, in open bargaining, the restraint had been accepted in exchange for something else that the players sought that was in their best interest. The court held that such an exchange had not taken place.

In reviewing the history of the collective bargaining attempts between the players and the league, the court found that in none of the two bargaining agreements entered into by the National Football League Players' Association and the NFL "was there any trade off or quid pro quo whereby the union agreed to the Rozelle Rule in return for other benefits."[84] There has never been anything that "could be legitimately characterized as 'bargaining' between the parties with respect to the Rozelle Rule."[85] It was the defendants' position throughout the negotiations that led to the 1970 bargaining agreement that the Commissioner's powers, including the Rozelle Rule, "could not be touched and were non-negotiable."[86] The inability of the players to end or even modify the Rule in their negotiations was attributed to the weakness on the part of the players vis-a-vis the league due to the newness of the players' association, the power of the league, dissension among the

80. Meat Cutters Local Union 189 v. Jewel Tea Co., 381 U.S. 676 (1965).
81. *Id.* at 690.
82. Mackey, ¶ 7.1 at 11.
83. *Id.*, ¶ 7.5 at 11.
84. *Id.*, ¶ 7.7 at 12.
85. *Id.*, ¶ 7.9 at 12.
86. *Id.*, ¶ 7.9.6 at 13.

players, inadequate financing, and communication problems.[87] Thus the ultimate conclusion of the court is that the "Rozelle Rule has never been the subject of serious, intensive, arms-length collective bargaining"[88] and that it has been "unilaterally imposed by the NFL and member club[s]"[89] on the players since 1963. As a result, the Rule cannot be considered bargained for, is not in the players' best interest, and no labor exemption is available.[90]

The last defense of the NFL was that this dispute is within either the exclusive or primary jurisdiction of the National Labor Relations Board. These jurisdictional issues arise when the jurisdiction of an administrative agency conflicts with that of a court seeking to make an antitrust determination. The conflict can be resolved in one of three different ways. The court may invoke the concept of exclusive jurisdiction and dismiss the antitrust action when the court finds that "it has been totally ousted of jursidiction because Congress, in enacting the regulatory statute, intended to override the fundamental national policies embodied in the antitrust laws."[91] The courts have rarely found such implied repeals of the antitrust laws and the *Mackey* court flatly concluded that "[t]he National Labor Relations Board does not have exclusive jurisdiction over the subject matter of this lawsuit."[92]

A second way of resolving jurisdictional conflict is the related concept of primary jurisdiction. Under this doctrine, the court is not stripped of jurisdiction. Instead, the antitrust proceeding is stayed pending agency consideration when such consideration would be of material assistance to the court in deciding the antitrust issues.[93] The *Mackey* court concluded that no such agency consideration was needed, probably because it believed that the issues involved in this case were not within the particular expertise of the Board. The court also noted that "[t]he doctrine of exclusive primary National

87. *Id.*, ¶¶ 7.10.1, 7.10.2, 7.10.5 at 13-14.

88. *Id.*, ¶ 7.12 at 14.

89. *Id.*

90. Virtually identical reasoning was presented in two other cases that considered the issues of player restrictions in professional sports. Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D. N.Y. 1975); Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972).

91. 16F J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION 44A-10 (1975) *citing* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

92. Mackey, ¶ 8.1 at 15.

93. 16F J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION 44A-10 (1975).

Labor Relations Board jurisdiction has never been applied by the Supreme Court to avoid a determination on the merits of an antitrust claim."[94] Having disposed of both jurisdictional claims of the NFL, the court opted for the third resolution to the apparent conflict and asserted its own jurisdiction.

After concluding that the NFL Rozelle Rule was a per se violation of the antitrust laws, that it violated the rule of reason and that the NFL's defenses to the application of the antitrust laws were without merit, the court stated that the Rule is "hereby declared to be in violation of the antitrust laws" and that all defendants are "permanently restrained and enjoined . . . from continuing, attempting to continue or otherwise enforcing the Rozelle Rule against plaintiffs."[95] Judgment was "stayed pending appeal or until further Order of the Court."[96]

Although the court found the Rozelle Rule a violation of antitrust law, illegal and unenforceable, other anticompetitive practices of the defendants, identified by the court for contextual purposes, were left unchallenged and untouched. This decision seems to have some strong implications for them also. The player draft is a classic example of a group boycott in the *FOGA-Klor*'s mold. The rule that no player is even eligible for the draft until his college class graduates has already fallen in the National Basketball Association[97] and the comparable NFL rule is stricter than its NBA counterpart.[98] The basic draft itself is a clear group boycott. The NFL teams, holders of a monopoly over professional football in the United States, have agreed in concert that no team will deal with a player under any circumstances if another team has drafted that player. This case may also make the option clause, contained in the mandatory standard player contract, more vulnerable to attack. While the clause has been upheld in one case,[99] later cases have indicated that it may have lost its favor because it is a part of the web of anticompetitive player restrictions.[100] The tampering rule de-

94. Mackey, ¶ 8.2.1 at 15.

95. Mackey, ¶ 10.3 at 15.

96. *Id.*, ¶ 10.6 at 16.

97. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

98. NFL Constitution and By-Laws, 1975, § 12.1.

99. Dallas Cowboys Football Club v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961).

100. Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972).

nies a player the right to seek competitive bids for his services until up to four and a half months after the end of any contract duties he has to any team. Such a restriction under the reasoning of this case is clearly subject to attack as an unreasonable restraint of competition. Thus, the whole system developed by the NFL to force players to remain with the teams to which they are presently under contract appears about to crumble. Nor should we expect the effect of decisions such as the one made by the Minnesota court to be restricted to football only. Similar rules have been subject to attack in basketball, hockey, and other big business sports. Only baseball seems immune.

The long term effects of the fall of these rules is difficult to predict. While the court is probably correct in concluding that the immediate effects will be minimal, it will be interesting to see what forces determine player salaries and benefits when free competition reigns. Under the present conditions, a player and team are forced bedfellows, largely unable to deal with others. When such forced relations are gone, it would seem that the general salary level would increase for players good enough to have bargaining power with two teams. Perhaps warm weather cities would be able to sign good players for less than northern cities. Perhaps teams with harsh coaches would have to pay more than teams with likeable coaches. Perhaps teams with winning traditions would have to pay less than losers. Perhaps teams with either artificial or real turf would have a bargaining advantage depending on what the players like. Teams located in cities with more to offer socially, culturally, or recreationally may have an advantage. Perhaps player continuity would even be increased as several players who played together in college seek employment on the same professional team. Maybe interest would increase as local athletes could play college and professional ball in the same area.

What will actually come of all this remains to be seen. The optimal solution would be to have the players and the NFL agree to some compromise while the order of judgment is stayed. The bargaining strength of the players, a concern of the court in player-team negotiations, has been substantially increased. The conduct of both parties will be most interesting pending an outcome of the appeals.

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